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Suits Against Terrorist States

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Suits Against Terrorist States

Summary

In § 2002 of the “Victims of Trafficking and Violence Protection Act of 2000,” Congress directed the Secretary of the Treasury to pay portions of eleven judgments that have been (or will be) handed down in suits against terrorist states since 1996. With respect to one judgment against Cuba, § 2002 provided that payment would be made out of the assets of Cuba in the United States that have been blocked since 1962. With respect to ten judgments against Iran, Congress directed that payment be made out of appropriated funds (up to a specified ceiling) and that the U.S. then be entitled to seek reimbursement for those payments from Iran. As a consequence, \$96.7 million of the \$193.5 million in Cuban assets frozen in this country has been paid in the one judgment against Cuba; and over \$350 million in U.S. funds has been (or will be) paid in nine judgments against Iran, with one more case not yet decided.

Judgments against terrorist states in suits other than these eleven have continued to be handed down by the courts. But § 2002 provided no procedure for claimants in other suits other than those designated to obtain satisfaction of their judgments. Moreover, other questions have been raised about the merits of the compensation program established by § 2002. Nearly six thousand claims against Cuba for death, injury, and expropriation during and after Castro’s takeover were determined to be legitimate by the Foreign Claims Settlement Commission in the late 1960s. But no compensation has ever been paid in these cases; and some of these claimants now criticize the use of a substantial portion of Cuba’s frozen assets to provide compensation for a single, later terrorist act. In the case of the judgments against Iran, some have questioned the use of U.S. funds to pay compensation. Also, both the Clinton and Bush Administrations have raised objections to past efforts to use diplomatic property and frozen assets to satisfy the judgments against terrorist states.

This issue has its origin in amendments to the Foreign Sovereign Immunities Act enacted in 1996 which allow civil suits by U.S. victims of terrorism against the states responsible for, or complicit in, the terrorist act. It has become increasingly complex as Congress has sought to facilitate payment of the judgments rendered. The subject may well be a matter of legislative concern in the second session of the 107th Congress: In the fiscal 2002 appropriations act for the Departments of the Treasury, Justice, and State, Congress directed that the Administration submit a legislative proposal to establish “a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism” by the time it submits its proposed budget for fiscal 2003. Adding a further element of complexity, the appropriations act also contained a provision authorizing those who were held hostage by Iran in 1979-1981 to bring suit against that state under the terrorist state exception to the FSIA, notwithstanding the agreement in the Algiers Accord that led to their release which barred such suits.

This report provides background on the FSIA; details the evolution of the terrorist state exception and subsequent amendments regarding payment of the judgments; sets forth the policy and legal arguments that have been adduced; and lists the cases covered by § 2002, the payments that have been made, and the amount of terrorist state assets frozen in the U.S. The report will be updated as events warrant.

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Suits Against Terrorist States

Introduction

In § 2002 of the “Victims of Trafficking and Violence Protection Act of 2000,”¹ Congress directed the Secretary of the Treasury to pay portions of eleven judgments that have been (or will be) handed down in suits against terrorist states since 1996. With respect to one judgment against Cuba, § 2002 provided that payment would be made out of the assets of Cuba in the United States that have been blocked since 1962. With respect to ten judgments against Iran, Congress directed that payment be made out of appropriated funds and that the U.S. then be entitled to seek reimbursement for those payments from Iran. As a consequence, \$96.7 million of the estimated \$193.5 million in Cuban assets frozen in this country² has been paid to the claimants in the suit against Cuba; and over \$350 million in U.S. funds has been (or soon will be) paid out with respect to nine judgments against Iran, with one additional case still pending.

Judgments in suits against terrorist states other than these eleven have continued to be handed down by the courts. But § 2002 provided no procedure for claimants in suits other than the ones identified to obtain satisfaction of their judgments. Moreover, other questions have been raised about the merits of the limited compensation program established by § 2002. Nearly six thousand claims against Cuba for death, injury, and expropriation during and after Castro’s takeover were determined to be legitimate by the Foreign Claims Settlement Commission in the late 1960s. But no compensation has ever been paid in these cases; and some of these claimants now question the fairness of using half of Cuba’s frozen assets to provide compensation for a single, later terrorist act.³ With respect to the judgments against Iran, some have questioned the use of U.S. funds to pay compensation. In addition, both the Clinton and Bush Administrations have raised, and continue to raise, constitutional and diplomatic objections to efforts to satisfy the judgments against terrorist states out of frozen assets or seizure of diplomatic property.

This situation had its origin in amendments to the Foreign Sovereign Immunities Act (FSIA)⁴ enacted in 1996 which allow civil suits by U.S. victims of terrorism against the states responsible for, or complicit in, the terrorist acts; and the issue has

¹P.L. 106-386, Division C, § 2002 (Oct. 28, 2000); 114 Stat. 1541.

²See Appendix II.

³In 1996 the Cuban Air Force shot down two “Brothers to the Rescue” planes notwithstanding that the plane were outside of Cuba’s air space. In *Alejandro v. Republic of Cuba*, 996 F.Supp. 1239 (S.D. Fla. 1997), a federal district court awarded the families of three of the four occupants of the planes a total of \$187.7 million in damages against Cuba.

⁴28 U.S.C.A. 1602 *et seq.*

developed a number of complex dimensions since that time. The subject may well be a matter of legislative concern in the second session of the 107th Congress: In the fiscal 2002 appropriations act for the Departments of the Treasury, Justice, and State, Congress directed that the Administration submit a legislative proposal to establish “a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism” by the time it submits its proposed budget for fiscal 2003. In the same act Congress also added a further element of complexity to the situation by specifying that a suit against Iran by those who were held hostage in 1979-81 is not barred by the FSIA.⁵ One element of the Algiers Accords that led to the release of the hostages in 1981 provided that Iran would be immune from suit for the incident.

This report provides background on the doctrine of state immunity and the FSIA; summarizes the 1996 amendments to the FSIA; details the subsequent Congressional efforts to assist plaintiffs in obtaining satisfaction of their judgments; sets forth the legal and policy arguments that have made for and against those efforts; lists the cases covered by § 2002, the amount of compensation that has been paid in each case, and the source of the compensation; and lists the amount of the blocked assets of each terrorist state. The report will be updated as events warrant.

Background on State Immunity

Customary international law historically afforded states complete immunity from being sued in the courts of other states. In the words of Chief Justice Marshall, this immunity was rooted in the “perfect equality and absolute independence of sovereigns” and the need to maintain friendly relations. Although each nation has “full and absolute” jurisdiction within its own territory, the Chief Justice stated, that jurisdiction, by common consent, does not extend to other sovereign states:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to this independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.⁶

⁵Roeder v. Islamic Republic of Iran, Case Number 1:00CV03110 (EGS) (D.D.C., filed December 29, 2000).

⁶The Schooner Exchange, 11 U.S. (7 Cranch) 116, 137 (1812) (holding a French warship to be immune from the jurisdiction of a U.S. court). In *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926), the Court held this principle of immunity to apply as well to state-owned commercial ships.

During the last century, however, this principle of total state immunity became subject to limitation after a number of states began engaging directly in commercial activities. To allow states to maintain their immunity in the courts of other states even while engaged in ordinary commerce, it was said, “gave states an unfair advantage in competition with private commercial enterprise” and denied the private parties in other nations with whom they dealt their normal recourse to the courts to settle disputes.⁷ As a consequence, numerous states immediately before and after World War II adopted a restrictive principle of state immunity preserving state immunity for most cases but allowing states to be sued for claims arising out of their commercial activities.

For the United States this restrictive principle was first adopted by administrative action in 1952⁸ and then was generally accepted by the courts. In 1978 Congress codified the principle in the Foreign Sovereign Immunities Act (FSIA).⁹ The FSIA states the general principle that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States”¹⁰ and then sets forth several exceptions. The primary exceptions are for cases in which “the foreign state has waived its immunity either expressly or by implication,” cases in which “the action is based upon a commercial activity carried on in the United States by the foreign state,” and suits against a foreign state for personal injury or death or damage to property occurring in the United States as a result of the tortious act of an official or employee of that state acting within the scope of his office or employment.¹¹ For most claims the Act also provides that the commercial property of a foreign state in the U.S. may be attached in satisfaction of a judgment against that state regardless of whether the property was used for the activity on which the claim was based.¹²

The Anti-Terrorism and Effective Death Penalty Act of 1996

In 1996 Congress added another exception to the FSIA which allows the federal and state courts to exercise jurisdiction over foreign states in civil suits by U.S. victims of terrorism.¹³ More specifically, one part of the “Anti-Terrorism and

⁷AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW THIRD: THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) (Vol. 1), at 391.

⁸The Acting Legal Adviser of the Department of State, Jack B. Tate, stated in a letter to the Acting Attorney General that in future cases the Department would follow the restrictive principle. 26 *Department of State Bulletin* 984 (1952). Previously, when a case against a foreign state arose, the State Department routinely asked the Department of Justice to inform the court that the government favored the principle of absolute immunity; and the courts usually acceded to this advice. The Tate letter meant that the government would no longer make this suggestion in cases against foreign states involving commercial activity.

⁹28 U.S.C.A. 1602 *et seq.*

¹⁰*Id.* § 1604.

¹¹*Id.* § 1605.

¹² *Id.* § 1610.

¹³P.L. 104-132, Title II, § 221 (April 24, 1976); 110 Stat. 1241; 28 U.S.C.A. 1605(a)(7) (continued...)

Effective Death Penalty Act of 1996" (AEDPA) amended the FSIA to provide that a foreign state is not immune from the jurisdiction of the federal and state courts in cases in which

money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency¹⁴

To fall within the purview of this section, the amendment further required that the foreign state be designated as a state sponsor of terrorism by the State Department at the time the act occurred,¹⁵ that either the claimant or the victim of the act of terrorism be a U.S. national,¹⁶ and that the state which is sued be given a prior opportunity to arbitrate the claim if the act on which the claim is based occurred in that state. The Act authorized the courts to award both compensatory and punitive damages and stated that the exception to immunity applied to pertinent causes of action that arose before, on , or after its date of enactment.¹⁷ The Act further allowed the commercial property of a foreign state in the U.S. to be attached in satisfaction of a judgment against that state under this amendment regardless of whether the

¹³(...continued)
(West Supp. 2001).

¹⁴*Id.*

¹⁵The State Department identifies state sponsors of terrorism pursuant to § 6(j) of the Export Administration Act of 1979 (50 U.S.C.A. App. 2405(j)), § 620A of the Foreign Assistance Act (22 U.S.C.A. 2371), and § 40(d) of the Arms Export Control Act (22 U.S.C.A. 2780(d)). The list, which is published annually, currently includes Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. *See* 22 CFR Part 126(1)(a) (2001).

¹⁶As initially enacted, the statute provided that a terrorist state could not be sued if “either the claimant or victim was not a U.S. national.” Because of concern that the provision could be read to require that both the claimant and victim be U.S. nationals and that, as a consequence, some of the families who were victimized by the terrorist bombing of Pan Am 103 over Lockerbie, Scotland, would be excluded, Congress amended the language in 1997 to bar such suits only if “neither the claimant nor the victim was a national of the United States” *See* P.L. 105-11, 105th Cong., 1st Sess. (April 25, 1997) and H. Rept. 105-48 (April 10, 1997).

¹⁷28 U.S.C.A. 1605 note (West Supp. 2001).

property was involved in the act on which the claim was based.¹⁸ The Clinton Administration supported these changes in the FSIA.

Later in 1996 Congress enacted a counterpart statute giving injured parties or their legal representatives a cause of action for suits against terrorist states.¹⁹

¹⁸*Id.* § 1610(b)(2). These amendments to the FSIA did not receive much debate or explanation during the AEDPA's consideration by the Senate and the House. Provisions similar to what was enacted were included in both the Senate and the House measures as introduced (S. 735, § 221 and H.R. 2703, § 803 respectively). But no committee report was filed on either bill; and the only change that appears to have been made during floor debate was a slight amendment by Rep. Hyde in a manager's amendment in the House imposing a 10-year statute of limitations on such suits and slightly modifying the provision concerning pre-trial arbitration. *See* 142 CONG. REC. H 2166 (daily ed., March 13, 1996). The report of the conference committee simply stated as follows:

Section 221--House section 803 recedes to Senate section 206, with modifications. This subtitle provides that nations designated as state sponsors of terrorism under section 6(j) of the Export Administration Act of 1979 will be amenable to suit in U.S. courts for terrorist acts. It permits U.S. federal courts to hear claims seeking money damages for personal injury or death against such nations and arising from terrorist acts they commit, or direct to be committed, against American citizens or nationals outside of the foreign state's territory, and for such acts within the state's territory if the state involved has refused to arbitrate the claim. H. Conf. Rept. 104-518 (April 15, 1996).

However, it might be noted that the House had adopted a similar measure during the second session of the previous Congress. The Department of State and the Department of Justice had opposed the legislation at that time. But the report of the House Judiciary Committee explained its rationale as follows:

The difficulty U.S. citizens have had in obtaining remedies for torture and other injuries suffered abroad illustrates the need for remedial legislation. A foreign sovereign violates international law if it practices torture, summary execution, or genocide. Yet under current law a U.S. citizen who is tortured or killed abroad cannot sue the foreign sovereign in U.S. courts, even when the foreign country wrongly refuses to hear the citizen's case. Therefore, in some instances a U.S. citizen who was tortured (or the family of one who was murdered) will be without a remedy.

H.R. 934 stands for the principle that U.S. citizens who are grievously mistreated abroad should have an effective remedy for damages in some tribunal, either in the country where the mistreatment occurred or in the United States. To this end, the bill would add a new exception to the FSIA that would allow suits against foreign sovereigns that subject U.S. citizens to torture, extrajudicial killings or genocide and do not provide adequate remedies for those harms.

H. Rept. 103-702, 103d Cong., 2d Sess. (Aug. 16, 1994), at 4.

¹⁹P.L. 104-208, Title I, § 101(c) (Sept. 30, 1996); 110 Stat. 2009-172; 28 U.S.C.A. 1605 note. The statute gives U.S. nationals and their legal representatives a cause of action for acts of a foreign state over which the courts of the U.S. have jurisdiction under the AEDPA.

Amendments by the 105th Congress (1997-1998)

Several suits were quickly filed against Cuba and Iran pursuant to these provisions. Neither state recognized the jurisdiction of the U.S. courts in such suits; and, thus, both refused to appear in court and mount a defense. Nonetheless, several federal trial courts heard the evidence proffered by the plaintiffs and found both Iran and Cuba to be culpable. As a consequence, several courts entered default judgments against each state and awarded the plaintiffs substantial amounts in compensatory and punitive damages.²⁰

Neither Iran nor Cuba had any inclination to pay the damages that had been assessed in these cases; and as a consequence, the plaintiffs sought to obtain certain properties and other assets owned by the states in question which were within the jurisdiction of the United States to satisfy the judgments. In the case of *Flatow v. Islamic Republic of Iran*, *supra*, attempts were made to attach the embassy and several diplomatic properties of Iran located in Washington, D.C., the proceeds that had accrued from the rental of those properties after diplomatic relations had been broken, and an award in favor of Iran and against the U.S. government that had been rendered by the Iran-U.S. Claims Tribunal but had not yet been paid.²¹ The Clinton Administration, however, opposed these efforts. It argued that the diplomatic properties and the rental proceeds were essentially sovereign and not commercial in nature and that, therefore, they could not be attached pursuant to the FSIA. The Administration further argued that the debt owed to Iran as a result of the decision of the Claims Tribunal and the funds which might be used to pay the award were U.S. property and not Iranian property and, thus, were also immune from attachment. In addition, the Administration argued that it was obligated to protect Iran's diplomatic

²⁰See *Alejandro v. Republic of Cuba*, 996 F.Supp. 1239 (S.D. Fla. 1997) (\$50 million in compensatory damages and \$137.7 million in punitive damages awarded to the families of three of the four persons who were killed when Cuban aircraft shot down two Brothers' to the Rescue planes in 1996); *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1 (D.D.C. 1998) (\$27 million in compensatory damages and \$225 million in punitive damages awarded to the father of Alisa Flatow, who was killed in 1995 by a car bombing in the Gaza Strip by Islamic Jihad, an organization which the court found to be funded by Iran); and *Cicippio v. Islamic Republic of Iran*, 18 F.Supp. 2d 62 (D.D.C. 1998) (\$65 million awarded in compensatory damages to three persons (and two of their spouses) who were kidnaped, held hostage, and tortured in Lebanon in the mid-1980s by Hezbollah, an organization which the court found to be funded by Iran).

²¹The Iran-U.S. Claims Tribunal at the Hague was created pursuant to provisions in the Algiers Accord of 1981 that led to the release of the U.S. hostages. Claims by U.S. nationals against Iran that were outstanding at the time of the release of the hostages as well as claims by Iranian nationals against the U.S. and contractual claims between the two governments were made subject to case-by-case arbitration by the Tribunal. Most Iranian assets held by U.S. persons or entities at that time were transferred to the Federal Reserve Bank of New York and were either returned to Iran or were forwarded to an escrow account for use in satisfying judgments rendered against Iran by this Tribunal. See the various agreements between the U.S. and Iran relating to the release of the hostages (known as the Algiers Accord), 20 ILM 223-240 (Jan. 1981); Executive Orders 12276-12284, 46 Fed. Reg. 7913 (Jan. 19, 1981); and 31 CFR Part 535.

properties by the Vienna Convention on Diplomatic Relations²² and the Vienna Convention on Consular Relations²³ and that using the properties to pay court judgments would expose U.S. diplomatic and consular properties to similar treatment by other countries. The courts agreed and quashed the writs of attachment that had been filed.²⁴

Efforts were also mounted in both the *Flatow* case and in *Alejandro v. Republic of Cuba, supra* (the Brothers to the Rescue case), to obtain the assets of Iran and Cuba in the U.S. that had been blocked by the U.S. government.²⁵ Iran's assets in the U.S. had been ordered frozen under the authority of the International Emergency Economic Powers Act (IEEPA)²⁶ at the time of the hostage crisis in 1979²⁷; but most had been returned to Iran or placed in an escrow account in England subject to the decisions of the Iran-U.S. Claims Tribunal that had been created by the Algiers Accord.²⁸ Cuba's assets in the U.S., in turn, had been blocked since the early 1960s under the authority of the Trading with the Enemy Act (TWEA).²⁹ The Clinton Administration opposed the efforts to obtain these assets as well. It argued that such assets are useful, and historically have been used, as leverage in working out foreign policy disputes with the countries in question and that they will be useful in negotiating the possible future re-establishment of normal relations with the countries in question. The Administration also noted that numerous other U.S. nationals had legitimate (and prior) non-terrorist claims against these countries that would be frustrated if the assets were used solely to compensate the victims of terrorism.³⁰

²²23 UST 3227 (1972).

²³21 UST 77 (1969).

²⁴For a more detailed description of these proceedings, see Sean Murphy, *Satisfaction of U.S. Judgments Against State Sponsors of Terrorism*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 117 (2000).

²⁵See Appendix II for a list of the amounts of the assets of each state on the terrorist list that are blocked in the U.S.

²⁶50 U.S.C.A. 1701 *et seq.* IEEPA gives the President substantial authority to regulate economic transactions with foreign countries and nationals to deal with "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such a threat."

²⁷Executive Order 12170, 44 Fed. Reg. 65729 (Nov. 14, 1979).

²⁸See n. 20.

²⁹50 U.S.C.A. App. 5. TWEA gives the President powers similar to those of IEEPA to regulate economic transactions with foreign countries and nationals in time of war. When it was used to freeze Cuba's assets in 1962, it also applied in times of national emergency.

³⁰In the 1960s Congress directed the Foreign Claims Settlement Commission to determine the number and amount of legitimate claims against Cuba resulting from Fidel Castro's takeover of the government and subsequent expropriation of property from January 1, 1959, and October 16, 1964. P.L. 88-666, Title V (Oct. 16, 1964); 73 Stat. 1110; 22 U.S.C.A. 1643. The program was completed in 1972 and found 5,911 claims totaling \$1,851,057,358 (in 1972 valuations) to be valid. Those claims remain pending.

More generally, it contended that using frozen assets to compensate victims of state-sponsored terrorism exposes the United States to the risk of reciprocal actions using U.S. assets by other states.³¹

In an attempt to override these objections, Congress in 1998 further amended the FSIA to provide that any property of a terrorist state frozen pursuant to TWEA or IEEPA and any diplomatic property of such a state could be subject to execution or attachment in aid of a judgment against that state pursuant to the terrorist exception to the FSIA.³² Section 117 of the Treasury Department appropriations act for fiscal 1999 further mandated that the State and Treasury Departments “shall fully, promptly, and effectively assist” any judgment creditor or court issuing a judgment

³⁰(...continued)

In the Iran Claims Settlement Act of 1985, Congress directed the Foreign Claims Settlement Commission to determine the validity and amount of small claims against Iran (those for less than \$250,000) pending at the time of the hostage crisis and to distribute to such claimants the proceeds of any *en bloc* settlement concluded by the U.S. and Iran. See P.L. 99-93, Title V, §§ 505-505 (Aug. 16, 1985); 99 Stat. 437; 50 U.S.C.A. 1701 note. In 1990 the U.S. and Iran concluded such an agreement. See State Department Office of the Legal Adviser, *Cumulative Digest of United States Practice in International Law 1981-1988* (Book III) (1995), at 3201. All other pre-1981 claims against Iran (and against the U.S. by Iran and Iranian nationals) remained subject to case-by-case arbitration by the Iran-U.S. Claims Tribunal.

³¹Both Cuba and Iran have reportedly enacted statutes allowing suits against the United States for acts of terrorism or “interference.” See Sean Murphy, *Contemporary Practice of the United States Relating to International Law: U.S. Judgments Against Terrorist States*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 134 (2001); Mosk, Richard M., *Picking our Own Pocket*, NATIONAL LAW JOURNAL, September 17, 2001, at A20; and *Iran Charges Court to Hear Cases Against Foreign Countries, Notably US*, AGENCE FRANCE PRESSE, July 10, 2001.

³²P.L. 105-277, Div. A, Title I, § 117 (Oct. 21, 1998); 112 Stat. 2681-491; 28 U.S.C.A. 1610(f)(1)(A) (West Supp. 2001). This section was added to the FSIA by § 117 of the Treasury and General Government Appropriations Act for Fiscal Year 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, P.L. 105-277 (1998); 112 Stat. 2681. The provision, without the waiver authority, had originated in the Senate version of the Treasury appropriations bill; but the Senate Appropriations Committee had offered no explanation. See S. 2312 and S. Rept. 105-251 (July 15, 1998). It had also been offered during House floor debate on the House version of the Treasury appropriations bill by Rep. Saxton but had been subject to a point of order as legislation on an appropriations bill. 144 CONG. REC. H 5710 (July 16, 1998). In conference with the House, the provision was retained, but waiver authority for the President was added. The conference reports offered no further explanation. See H.R. 4104, H. Conf. Rept. 105-560 (Oct. 1, 1998), and H. Conf. Rept. 105-789 (Oct. 7, 1998). H.R. 4104 was not enacted but its provisions were folded into the omnibus act. Both immediately prior and after the enactment of the omnibus act, several members of the House and Senate expressed the view that the waiver authority of § 117 should be read to apply only to the requirement that the State and Justice Departments assist judgment creditors in locating the assets of terrorist states. See, e.g., 144 CONG. REC. S 12696, 12705-06 (daily ed. October 29, 1998) and E 2314 (daily ed. Nov. 12, 1998). But a couple of House members also expressed the view that the waiver authority applied to the whole of § 117. See 144 CONG. REC. H 11647 (daily ed. Oct. 29, 1998).

against a terrorist state “in identifying, locating, and executing against the property of that foreign state”³³ Because of the Administration’s continuing objections, however, the amendment also gave the President authority to “waive the requirements of this section in the interest of national security.” On October 21, 1998, the day the legislation was signed into law, President Clinton did so.³⁴ The President subsequently explained his reasons in the signing statement for the bill as follows:

I am concerned about section 117 of the Treasury/General Government appropriations section of the act, which amends the Foreign Sovereign Immunities Act. If this section were to result in attachment and execution against foreign embassy properties, it would encroach on my authority under the Constitution to “receive Ambassadors and other public ministers.” Moreover, if applied to foreign diplomatic or consular property, section 117 would place the United States in breach of its international treaty obligations. It would put at risk the protection we enjoy at every embassy and consulate throughout the world by eroding the principle that diplomatic property must be protected regardless of bilateral relations. Absent my authority to waive section 117’s attachment provision, it would also effectively eliminate use of blocked assets of terrorist states in the national security interests of the United States, including denying an important source of leverage. In addition, section 117 could seriously impair our ability to enter into global claims settlements that are fair to all U.S. claimants, and could

³³*Id.*

³⁴Presidential Determination 99-1 (Oct. 21, 1998), *reprinted in* 34 WEEKLY COMP. PRES. DOC. 2088 (Oct. 26, 1998). On the day the President exercised the waiver authority, the White House Office of the Press Secretary issued the following explanatory statement:

...[T]he struggle to defeat terrorism would be weakened, not strengthened, by putting into effect a provision of the Omnibus Appropriations Act for FY 1999. It would permit individuals who win court judgments against nations on the State Department’s terrorist list to attach embassies and certain other properties of foreign nations, despite U.S. laws and treaty obligations barring such attachment.

The new law allows the President to waive the provision in the national security interest of the United States. President Clinton has signed the bill and, in the interests of protecting America’s security, has exercised the waiver authority. If the U.S. permitted attachment of diplomatic properties, then other countries could retaliate, placing our embassies and citizens overseas at grave risk. Our ability to use foreign properties as leverage in foreign policy disputes would also be undermined.

Statement by the Press Secretary (October 21, 1998).

But see *Alejandre v. Republic of Cuba*, 42 F.Supp.2d 1317 (S.D. Fla. 1999) (Presidential waiver authority held to apply only to the requirement that the Departments of State and Treasury assist judgment creditors and not to the provision subjecting blocked assets, including diplomatic property, to attachment). This decision was eventually reversed on other grounds by the U.S. Court of Appeals for the Eleventh Circuit – *Alejandre v. Telefonica Larga Distancia de Puerto Rico*, 183 F.3d 1277 (11th Cir. 1999). Another decision by a federal district court construed the President’s waiver authority broadly. *See Flatow v. Islamic Republic of Iran*, 76 F.Supp.2d 16 (D.D.C. 1999).

result in U.S. taxpayer liability in the event of a contrary claims tribunal judgment. To the extent possible, I shall construe section 117 in a manner consistent with my constitutional authority and with U.S. international legal obligations, and for the above reasons, I have exercised the waiver authority in the national security interest of the United States.³⁵

Amendments by the 106th Congress (1999-2000)

During the 106th Congress various Members continued to press for additional amendments to the FSIA that would allow the judgments against terrorist states to be satisfied; and the Clinton Administration continued its opposition.³⁶ During this time a number of additional judgments were handed down, all against Iran and all involving substantial awards of damages³⁷; and a number of other suits against terrorist states were filed.³⁸

More specifically, a measure entitled the “Justice for Victims of Terrorism Act” was introduced in both the House (by Rep. McCollum) and the Senate (by Senators Lautenberg and Mack).³⁹ Hearings were held on the proposal in both bodies; and a slightly revised version of the bill was adopted by the House and reported in the Senate. But the measure was never enacted. Instead, negotiations with the Administration reportedly led by Senators Lautenberg and Mack resulted in the addition of § 2002 to the “Victims of Trafficking and Violence Against Women Act of 2000.”⁴⁰ Section 2002, as noted above, mandates the payment of a portion of the damages awarded in one suit against Cuba and ten judgments against Iran, with payment of the former to be taken from Cuba’s frozen assets in this country and of the latter from appropriated funds “not otherwise obligated.”

³⁵Statement by President William J. Clinton Upon Signing H.R. 4328, 34 WEEKLY COMP. PRES. DOC. 2108 (Nov. 2, 1998), *reprinted in* 1998 U.S.C.C.A.N. 576.

³⁶*See Hearing Before the Senate Judiciary Committee on Terrorism: Victims’ Access to Terrorists’ Assets*, 106th Congress, 1st Sess. (October 27, 1999) and *Hearing Before the Subcommittee on Immigration and Claims of the House Judiciary Committee on H.R. 3485, the “Justice for Victims of Terrorists Act,”* 106th Congress, 2d Sess. (April 13, 2000).

³⁷*See* *Anderson v. Islamic Republic of Iran*, 90 F.Supp.2d 107 (D.D.C. March 24, 2000) (\$41.2 million in compensatory damages and \$300 million in punitive damages awarded to a journalist who was kidnapped and held in deplorable conditions for seven years by Hezbollah, which the court found to be funded by Iran) and *Eisenfeld v. Islamic Republic of Iran*, 2000 U.S.Dist.LEXIS 9545 (D.D.C. July 11, 2000) (\$24.7 million in compensatory damages and \$300 million in punitive damages awarded to the families of two young Americans who were killed when a bomb placed by Hamas operatives exploded on the bus on which they were riding in Israel).

³⁸*See Contemporary Practice of the United States Relating to International Law: U.S. Judgments Against Terrorist States*, *supra* n. 23 and Sean Murphy, *Contemporary Practice of the United States Relating to International Law: U.S. Judgments Against Terrorist States*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 134 (2001).

³⁹S. 1796, H.R. 3382, and H.R. 3485, 106th Cong., 1st Sess. (1999).

⁴⁰P.L. 106-386, § 2002 (Oct. 28, 2000); 114 Stat. 1541.

The “Justice for Victims of Terrorism Act” would have amended the FSIA to allow the attachment of all of the assets of a terrorist state, including blocked assets and including moneys due from or payable by the United States. It would have repealed the waiver authority granted in § 117 of the fiscal 1999 appropriations act for the Treasury Department and allowed the President to waive an authorization to attach assets only with respect to the premises of a foreign diplomatic mission.

In hearings on the measure, the Clinton Administration was repeatedly pilloried for its opposition to the efforts of victims of terrorism to collect on the judgments awarded. Senator Hatch, chair of the Senate Judiciary Committee, stated:

Unfortunately for the families of the “Brothers to the Rescue” victims and the family of Alisia Flatow, the Administration continues to fight the victims’ efforts in court – in effect taking a seat next to the terrorist states at the defense table in defending these actions. Now, not only must these families fight the terrorist states – they must also fight the Administration that had promised to support their efforts to obtain just compensation.⁴¹

Stephen Flatow, awarded \$247.5 million in a suit against Iran for the terrorist murder of his daughter, asserted:

The memory of Americans killed by terrorists requires us to continue to protest against administration attempts to stifle our efforts to collect that which has been awarded to us. If the administration will not help us, then, at least, let it get out of our way and stop sending lawyers to court at taxpayer expense to defend the interests of state sponsors of terrorism.⁴²

The sister of one of the “Brothers to the Rescue” pilots shot down by Cuba declaimed:

No words can possibly explain our shock when we went to court and found US attorneys sitting down at the same table as Cuba's attorneys. How can you explain to a mother who has lost her son, to a wife who has lost her husband, to a daughter who has lost her father, that their own government is taking the murderers's side? How can one understand the claim by the US that the frozen funds are needed to promote civil society and democracy in Cuba, and then have our country not take into account basic human rights and justice? What message are we, the United States, sending the Cuban people and its government when we allow a violation of the right to life to remain unpunished? The Clinton Administration has shut its doors to us.⁴³

Rep. McCollum, sponsor of the House bill, said:

⁴¹*Terrorism: Victims’ Access to Terrorist Assets – Hearing Before the Senate Committee on the Judiciary*, 106th Cong., 1st Sess. (Oct. 27, 1999) (statement of Sen. Hatch) (unprinted). Testimony given at the hearing is available at the Committee’s web site.

⁴²*Id.* (statement of Shephen Flatow).

⁴³*Id.* (statement of Maggie Alejandre Khuly).

Today, the subcommittee seeks to answer why the President said one thing and his administration insists upon doing another. It is my hope that our panel of witnesses will help us understand why the President and administration officials encourage victims to take terrorists to court under the 1996 Anti-Terrorism Act yet now, in contradiction to the President's words, the administration refuses to allow compensation out of the frozen assets of terrorist states against whom judgments have been rendered. Rather than waging a war on terrorism, it appears the administration is fighting the victims of terrorism.

...

I am concerned that the President has exercised what was intended to be a narrow national security waiver too broadly, and as a consequence, those who have committed acts of terror resulting in the death of American citizens are effectively going unpunished, and Americans are not receiving just compensation after favorable court verdicts. This is contrary to the clear intention of Congress both in the 1996 Anti-Terrorism Act and in the fiscal year 1999 Treasury Department appropriations bill.⁴⁴

Treasury Deputy Secretary Stuart E. Eizenstat, Defense Department Under Secretary for Policy Walter Slocombe, and State Department Under Secretary for Policy Thomas Pickering responded for the Administration in a joint statement.⁴⁵ While expressing support for the goal of “finding fair and just compensation for [the] grievous losses and unimaginable experiences” of the victims of terrorism, they said that the “Victims of Terrorism Act” was “fundamentally flawed” and had “five principal negative effects,” as follows:

First, blocking of assets of terrorist states is one of the most significant economic sanctions tools available to the President. The proposed legislation would undermine the President's ability to combat international terrorism and other threats to national security by permitting the wholesale attachment of blocked property, thereby depleting the pool of blocked assets and depriving the U.S. of a source of leverage in ongoing and office (*sic*) sanctions programs, such as was used to gain the release of our citizens held hostage in Iran in 1981 or in gaining information about POW's and MIA's as part of the normalization process with Vietnam.

Second, it would cause the U.S. to violate its international treaty obligations to protect and respect the immunity of diplomatic and consular property of other nations, and would put our own diplomatic and consular-property around the world at risk of copycat attachment, with all that such implies for the ability of the United States to conduct diplomatic and consular relations and protect personnel and facilities.

Third, it would create a race to the courthouse benefiting one small, though deserving, group of Americans over a far larger group of deserving Americans.

⁴⁴*Justice for Victims of Terrorism Act: Hearing Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary*, 106th Cong., 2d Sess. (April 13, 2000) (statement of Rep. McCollum). The transcript of the hearing is available on the subcommittee's web site.

⁴⁵*Id.* (statement submitted by Treasury Deputy Secretary Eizenstat, Defense Under Secretary for Policy Slocombe, and State Under Secretary Pickering). Deputy Secretary Eizenstat had given similar testimony in the Senate hearing as well.

For example, in the case of Cuba, many Americans have waited decades to be compensated for both the loss of property and the loss of the lives of their loved ones. This would leave no assets for their claims and others that may follow. Even with regard to current judgment holders, it would result in their competing for the same limited pool of assets, which would be exhausted very quickly and might not be sufficient to satisfy all judgments.

Fourth, it would breach the long-standing principle that the United States Government has sovereign immunity from attachment, thereby preventing the U.S. Government from making good on its debts and international obligations and potentially causing the U.S. taxpayer to incur substantial financial liability, rather than achieving the stated goal of forcing Iran to bear the burden of paying these judgments. The Congressional Budget Office ("CBO") has recognized this by scoring the legislation at \$420 million, the bulk of which is associated with the Foreign Military Sales ("FMS") Trust Fund. Such a waiver of sovereign immunity would expose the Trust Fund to writs of attachment, which would inject an unprecedented and major element of uncertainty and unreliability into the FMS program by creating an exception to the processes and principles under which the program operates.

Fifth, it would direct courts to ignore the separate legal status of states and their agencies and instrumentalities, overturning Supreme Court precedent and basic principles of corporate law and international practice by making state majority-owned corporations liable for the debts of the state and establishing a dangerous precedent for government owned enterprises like the U.S. Overseas Private Investment Corporation ("OPIC").

Nonetheless, the Senate and House Judiciary Committees reported, and the House passed, a slightly amended version of the "Justice for Victims of Terrorism Act." The bill in the Senate was reported without a committee report. In the House the report of the House Judiciary Committee stated:

The President's continued use of his waiver power has frustrated the legitimate rights of victims of terrorism, and thus this legislation is required. While still allowing the President to block the attachment of embassies and necessary operating assets, H.R. 3485 would amend the law to specifically deny blockage of attachment of proceeds from any property which has been used for any non-diplomatic purpose or proceeds from any asset which is sold or transferred for value to a third party.⁴⁶

The House passed the bill by voice vote under a suspension of the rules⁴⁷

⁴⁶H. Rept. 106-733, 106th Cong., 2d Sess. (July 13, 2000), at 4. As initially reported, H.R. 3485 also amended the "PayGo" provision of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C.A. 902(d)) to bar the Office of Management and Budget from estimating any changes in direct spending outlays and receipts that would result from enactment of the bill. Because this provision apparently had not been discussed in committee, the committee subsequently deleted it before the bill went to the floor. See H. Rept. 106-733 (Part 2), 106th Cong., 2d Sess. (July 18, 2000).

⁴⁷145 CONG. REC. H 6938 (daily ed. July 25, 2000).

Because the Clinton Administration continued to oppose the bill, extensive negotiations ensued between the Administration and interested Members of Congress; and ultimately these negotiations led to the enactment of a statute further amending the FSIA which was signed into law by President Clinton on October 28, 2000.⁴⁸ Section 2002 of the “Victims of Trafficking and Violence Protection Act of 2000” directs the Secretary of the Treasury to pay portions of eleven designated judgments against terrorist states. The designated judgments include any judgments against Cuba and Iran that had been handed down by July 20, 2000 (the *Alejandro, Flatow, Cicippio, Anderson* and *Eisenfeld* cases) and the suits which had been filed against either country on one of five named dates on or prior to July 27, 2000, and which would obtain a final judgment after July 27, 2000 (*see* Appendix I). The law gives the designated claimants three options:

First, they may obtain from the Treasury Department 110 percent of the compensatory damages awarded in their judgments, plus interest, if they relinquish all rights to compensatory and punitive damages awarded by U.S. courts. Second, they may obtain 100 percent of the compensatory damages awarded in their judgments, plus interest, if they relinquish (a) all rights to compensatory damages awarded by U.S. courts and (b) all rights to execute against or attach certain categories of property, including property that is at issue in claims against the United States before an international tribunal. The property in (b) would include Iran’s Foreign Military Sales (FMS) trust fund, which is at issue in a case before the Iran-U.S. Claims Tribunal. Third, claimants may decline to obtain any payments from the Treasury Department and then continue to pursue their judgments as best they can.⁴⁹

To pay the judgment in the *Alejandro* case against Cuba, the statute directs that the President vest and liquidate Cuban government properties that have been frozen under TWEA. To satisfy the ten judgments against Iran in the designated cases (*see* Appendix I), § 2002 provides as follows:

- The statute directs the Secretary of the Treasury to use any proceeds that have accrued from the rental of Iranian diplomatic and consular property in the U.S. plus appropriated funds not otherwise obligated (meaning U.S. funds) up to the amount contained in Iran’s Foreign Military Sales account.⁵⁰ (That account contains slightly more than \$400 million paid in advance by Iran for military equipment that, because of the takeover of Iran by Khomeini and the hostage crisis, has never been delivered. In a claim filed with the U.S.-Iran Claims Tribunal, Iran contends that it is entitled to the return of this money; but no judgment has yet been rendered by the arbitral tribunal.)
- If payments are paid out of U.S. funds, § 2002 states that the U.S. is subrogated to the rights of the persons who were paid (which means that the

⁴⁸ The statute is entitled the “Victims of Trafficking and Violence Protection Act of 2000” and primarily addresses the issue of international trafficking in women and children. The FSIA amendments were added to this measure in the House-Senate conference. *See* P.L. 106-386, § 2002(f)(1) (Oct. 28, 2000); 114 Stat. 1543.

⁴⁹ “Contemporary Practice of the United States Relating to International Law: U.S. Judgments Against Terrorist States,” *supra* n. 12, at 138.

⁵⁰ *Id.* at n. 31.

U.S. is entitled to pursue their entitlement to payment of the damage awards from Iran.)

- Section 2002 further provides that the U.S. “shall pursue” these subrogated rights as claims or offsets to any claims or awards that Iran may have against the United States; and it bars the payment or release of any funds to Iran from frozen assets or from the Foreign Military Sales Fund until these subrogated claims have been satisfied.

Section 2002 further expresses the “sense of the Congress” that relations between the U.S. and Iran should not be normalized until these subrogated claims have been “dealt with to the satisfaction of the United States.” It also “reaffirms the President’s statutory authority to manage and ... vest foreign assets located in the United States for the purpose [] ... of assisting and, where appropriate, making payments to victims of terrorism.” In addition, § 2002 modifies the provision of § 117 of the Treasury Department appropriations act for fiscal 1999 by changing the mandate that the State and Treasury Departments “shall” assist those who have obtained judgments against terrorist states in locating the assets of those states to the more permissive “should make every effort” to assist such judgment creditors.

Finally, § 2002 modifies the waiver authority that the President had been given in § 117. It repeals that subsection and instead provides that “[t]he President may waive any provision of paragraph (1) in the interest of national security.” (Paragraph (1), it might be noted, is the subsection that allows the frozen assets of a terrorist state, including its diplomatic property, to be attached in satisfaction of a judgment against that state.)⁵¹

Immediately after signing the legislation into law on October 28, 2000, President Clinton exercised the substitute waiver authority granted by § 2002 and waived “subsection (f)(1) of section 1610 of title 28, United States Code, in the interest of national security.”⁵² Thus, except as otherwise provided in § 2002, the bar to the attachment of the diplomatic property and the blocked assets of terrorist states to satisfy judgments against those states continues to be in place.⁵³

⁵¹Paragraph (1) is codified at 28 U.S.C.A. 1610(f)(1) (West Supp. 2001) and the modified waiver authority is codified at 28 U.S.C.A. 1610(f)(3) (West Supp. 2001).

⁵²Presidential Determination No. 2001-03 (Oct. 28, 2000); 65 Fed. Reg. 66483.

⁵³The report of the House-Senate conference committee on the “Victims of Trafficking” bill appears to express an intent that the waiver authority of § 2002 be exercised only on a case-by-case basis, as follows:

Subsection 1(f) of this bill repeals the waiver authority granted in Section 117 of the Treasury and General Government Appropriations Act for fiscal year 1999, replacing it with a clearer but narrower waiver authority in the underlying statute. The Committee hopes clarity in the legislative history and intent of subsection 1(f), in the context of the section as a whole, will ensure appropriate application of the new waiver authority.

This is a key issue for American victims of state-sponsored terrorism who have
(continued...)

In November and December, 2000, the Office of Foreign Assets Control in the Department of the Treasury issued a notice detailing the procedures governing

⁵³(...continued)

sued or who will in the future sue the responsible terrorism-list state, as they are entitled to do under the Anti-Terrorism Act of 1996. Victims who already hold U.S. court judgements, and a few whose related cases will soon be decided, will receive their compensatory damages as a result of this legislation. The Committee intends that this legislation will similarly help other pending and future Antiterrorism Act plaintiffs as and when U.S. courts issue judgements against the foreign state sponsors of specific terrorist acts

In replacing the waiver, the conferees accept that the President should have the authority to waive the court's authority to attach blocked assets. But to understand the view of the committee with respect to the use of the waiver, it must be read within the context of other provisions of the legislation.

A waiver of the attachment provision would seem appropriate for final and pending Anti-Terrorism Act cases identified in subsection (a)(2) of this bill. In these cases, judicial attachment is not necessary because the executive branch will appropriately pay compensatory damages to the victims and use blocked assets to collect the funds from terrorist states.

Of particular significance, this section reaffirms the President's statutory authority, *inter alia*, to vest blocked foreign government assets and where appropriate make payments to victims of terrorism. The President has the authority to assist victims with pending and future cases.

The Committee's intent is that the President will review each case when the court issues a final judgement to determine whether to use the national security waiver, whether to help the plaintiffs collect from a foreign state's non-blocked assets in the United States, whether to allow the courts to attach and execute against blocked assets, or whether to use existing authorities to vest and pay those assets as damages to the victims of terrorism.

When a future President does make a decision whether to invoke the waiver, he should consider seriously whether the national security standard for a waiver has been met. In enacting this legislation, Congress is expressing the view that the attachment and execution of frozen assets to enforce judgements in cases under the Anti-Terrorism Act of 1996 is not by itself contrary to the national security interest. Indeed, in the view of the Committee, it is generally in the national security interest of the United States to make foreign state sponsors of terrorism pay court-awarded damages to American victims, so neither the Foreign Sovereign Immunities Act nor any other law will stand in the way of justice. Thus, in the view of the committee the waiver authority should not be exercised in a routine or blanket manner, but only where U.S. national security interests would be implicated in taking action against particular blocked assets or where alternative recourse – such as vesting and paying those assets – may be preferable to court attachment.

H. Conf. Rept. 106-939, 106th Cong., 2d Sess. (Oct. 5, 2000), at 117-118.

application for payment by the claimants in the eleven designated cases (if they chose to do so).⁵⁴

In early 2001 the federal government liquidated \$96.7 million of the \$193.5 million of Cuban assets that had previously been frozen and paid that amount to the claimants in *Alejandro v. Republic of Cuba*.⁵⁵ The claimants in nine of the ten designated cases against Iran have been given more than \$350 million in compensation out of U.S. funds so far.⁵⁶ The tenth case remains pending. (See Appendix I for a listing of cases and payments made.)

Action by the 107th Congress

Suits against terrorist states under the FSIA exception have continued to be decided subsequent to the cutoff date of July 27, 2000, set in § 2002 of the Victims of Trafficking statute.⁵⁷ Some of these decisions are covered by the compensation

⁵⁴65 Fed. Reg. 70382 (Nov. 22, 2000) and 65 Fed. Reg. 78533 (Dec. 15, 2000).

⁵⁵996 F.Supp. 1239 (S.D. Fla. 1997).

⁵⁶This information has been provided by the Office of Foreign Assets Control and is current as of January 24, 2001.

⁵⁷“Contemporary Practice ...,” *supra* n. 21. The decisions so far include *Higgins v. Islamic Republic of Iran*, No. 1:99cv00377 (D.D.C. 2000) (\$55.4 million in compensatory damages and \$300 million in punitive damages awarded to the wife of a Marine colonel who was kidnaped and subsequently hung by Hezbollah while serving as part of the United Nations Truce Supervision Organization in Lebanon); *Sutherland v. Islamic Republic of Iran*, 151 F.Supp.2d 27 (D.D.C. 2001) (\$46.5 million in compensatory damages and \$300 million in punitive damages awarded to a professor (and his family) who was kidnaped while teaching at the American University in Beirut and subsequently imprisoned in “horrific and inhumane conditions” for six and a half years by Hezbollah); *Jenco v. Islamic Republic of Iran*, 154 F.Supp.2d 27 (D.D.C. 2001) (\$14.6 million in compensatory damages and \$300 million in punitive damages awarded to the estate and family of a priest who was kidnaped while working in Beirut as the Director of Catholic Relief Services and imprisoned in terrible conditions for a year and a half by Hezbollah); *Polhill v. Islamic Republic of Iran*, 2001 U.S. Dist. LEXIS 15322 (D.D.C. 2001) (\$31.5 million in compensatory damages and \$300 million in punitive damages awarded to the family of an American citizen who was kidnaped while working as a professor in Beirut and held in “deplorable” conditions for more than three years by Hezbollah); *Wagner v. Islamic Republic of Iran*, 172 F.Supp.2d 128 (D.D.C. 2001) (\$16.3 million in compensatory damages and \$300 million in punitive damages awarded to the estate and family of a petty officer in the U.S. Navy who was killed by a car bomb driven by a Hezbollah suicide bomber); *Elahi v. Islamic Republic of Iran*, 124 F.Supp.2d 97 (D.D.C. 2000) (\$11.7 million in compensatory damages and \$300 million in punitive damages awarded to the administrator of the estate of an Iranian dissident and naturalized U.S. citizen killed by gunshot in Paris by the Iranian Ministry of Information and Security); *Hill v. Republic of Iraq*, 175 F.Supp.2d 36 (D.D.C. 2001) (\$9 million in compensatory damages (against Iraq and Saddam Hussein) and \$300 million in punitive damages (against Saddam Hussein personally) awarded to twelve U.S. citizens who were held hostage by Iraq after its invasion of Kuwait in 1990); and *Hegna v. Islamic Republic of Iran*, ___ F.Supp.2d ___ (D.D.C. 2002) (\$42 million in damages awarded to the family of a U.S. Agency for International Development officer who was killed by Hezbollah militants during a hijacking of a Kuwaiti (continued...)

scheme set forth in § 2002. But other judgments, as well as additional cases that have been filed but not decided as yet, are not covered. As a consequence, pressure for finding some means to compensate the additional claimants has begun to build.⁵⁸ Congress has not as yet made specific provision for further compensation. But in the “Act Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 2001,”⁵⁹ Congress directed President Bush to submit, no later than the time he submits the proposed budget for fiscal 2003,

a legislative proposal to establish a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism (or relatives of deceased United States victims of international terrorism) that occurred or occurs on or after November 1, 1979.⁶⁰

No comparable provision had been in either the House or Senate-passed versions of H.R. 2500. But the Senate had adopted, without debate and as part of a package of amendments offered by Sen. Hollings, the floor manager for the bill, an amendment to § 2002 of the Victims of Trafficking Act that would have authorized partial payment of the judgments in five additional cases.⁶¹ In explaining the conference substitute for that provision, the conference report stated:

Objections from all quarters have been repeatedly raised against the current ad hoc approach to compensation for victims of international terrorism. Objections and concerns, however, will no longer suffice. It is imperative that the Secretary of State, in coordination with the Departments of Justice and Treasury and other relevant agencies, develop a legislative proposal that will provide fair and prompt compensation to all U.S. victims of international terrorism. A compensation system already is in place for the victims of the September 11 terrorist attacks; a similar system should be available to victims of international terrorism.⁶²

In signing the measure into law, President Bush cited the directive regarding submission of a comprehensive plan and stated that “I will apply this provision consistent with my constitutional responsibilities.”⁶³

⁵⁷(...continued)

Airlines flight in 1984). The last three cases are not covered by § 2002.

⁵⁸See Shawn Zeller, “Hoping to Thaw Those Frozen Funds,” 33 *National Journal* 3368-69 (Oct. 27, 2001).

⁵⁹P.L. 107-77 (November 28, 2001). The text of the Act and the conference report (H. Rept. 107-278) is printed at 147 CONG. REC. H 7986-H8038 (daily ed. Nov. 9, 2001).

⁶⁰*Id.* § 626, reprinted at 147 CONG. REC. H8001.

⁶¹See 147 CONG. REC. S 9365 (daily ed. Sept. 13, 2001).

⁶²H. Rept. 107-278, 107th Cong., 1st Sess. (Nov. 9, 2001), reprinted at 147 CONG. REC. H 8033 (daily ed. Nov. 9, 2001).

⁶³Office of the White House Press Secretary, “President Signs Commerce Appropriations Bill: Statement by the President on H.R. 2500” (November 28, 2001), available on the White House web site.

In addition, the conference agreement on the appropriations measure retained a Senate provision that attempts to extend the waiver of state immunity for suits against terrorist states in the FSIA to a case that has been brought in federal district court on behalf of the 52 embassy staffers who were held hostage by Iran from 1979-81 and their families. That case – *Roeder v. Islamic Republic of Iran*⁶⁴ – was filed in late 2000 and seeks both compensatory and punitive damages. In August, 2001, the trial court reportedly granted a default judgment to the plaintiffs. But in October, 2001, the U.S. government intervened in the proceeding prior to the determination of damages and asked that the judgment be vacated and the case dismissed. The government’s contention is that the suit is barred by the provisions of the 1981 Algiers Accord that led to the release of the hostages⁶⁵; and it was this intervention that precipitated the Senate amendment to the FSIA concerning the case. As amended, the pertinent section of the FSIA excludes suits against terrorist states from the immunity generally accorded foreign states but directs the courts to decline to hear such a case (with the amendment in italics)

if the foreign state was not designated as a state sponsor of terrorism ... at the time the act occurred, unless later so designated as a result of such act *or the act is related to Case Number 1:00CV03110 (ESG) in the United States District Court for the District of Columbia.*⁶⁶

The conference report on the bill explained the provision as follows:

Subsection (c) quashes the State Department’s motion to vacate the judgment obtained by plaintiffs in Case Number 1:00CV03110 (ESG) in the United States District Court for the District of Columbia. Consistent with current law, subsection (c) does not require the United States government to make any payments to satisfy the judgment.⁶⁷

⁶⁴Case Number 1:00CV03110 (ESG) (D.D.C., filed December 29, 2000).

⁶⁵Neely Tucker, “U.S. Seeking to Vacate Judgment Against Iran,” *Washington Post* (October 16, 2001), at A2. The Algiers Accord contains the following provision:

...[T]he United States ... will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claims asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence. 20 ILM 227 (1981).

⁶⁶P.L. 107-77, Title VI, § 626 (Nov. 28, 2001), amending 28 U.S.C.A. 1605(a)(7)(A).

⁶⁷H. Rept. 107-278, *supra* n. 56.

In signing the appropriations act into law on November 28, 2001, however, President Bush took note of this provision and commented as follows:

[S]ubsection (c) ... purports to remove Iran's immunity from suit in a case brought by the 1979 Tehran hostages in the District Court for the District of Columbia. To the maximum extent permitted by applicable law, the executive branch will act, and will encourage the courts to act, with regard to subsection 626(c) of the Act in a manner consistent with the obligations of the United States under the Algiers Accord that achieved the release of U.S. hostages in 1981.⁶⁸

Subsequently on December 13, 2001, the judge in *Roeder* heard arguments on the government's motion to dismiss; and the government continued to argue that the suit is barred by the Algiers Accord and ought to be dismissed. A week later in the fiscal 2002 appropriations act for the Department of Defense, Congress included a provision making a technical correction in the reference to the *Roeder* case.⁶⁹ But the conference report also elaborated on what it said was the effect and intent of the earlier amendment of the FSIA with respect to *Roeder*, as follows:

Sec. 208.--The conference agreement includes Section 208, proposed as Section 105 of Division D of the Senate bill, making a technical correction to Section 626 of Public Law 107-77. The language included in Section 626(c) of Public Law 107-77 quashed the Department of State's motion to vacate the judgment obtained by plaintiffs in Case Number 1:00CV03110(EGS) and reaffirmed the validity of this claim and its retroactive application. Nevertheless, the Department of State continued to argue that the judgment obtained in Case Number 1:00CV03110(EGS) should be vacated after Public Law 107-77 was enacted. The provision included in Section 626(c) of Public Law 107-77 acknowledges that, notwithstanding any other authority, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996 and the provision specifically allows the judgment to stand for purposes of award damages consistent with Section 2002 of the Victims of Terrorism Act of 2000 (Public Law 106-386, 114 Stat. 1541).⁷⁰

Nonetheless, in signing the Department of Defense appropriations measure into law on January 10, 2002, President Bush stated as follows:

Section 208 of Division B makes a technical correction to subsection 626(c) of Public Law 107-77 (the FY 2002 Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act), but does nothing to alter the effect of that provision or any other provision of law.

⁶⁸The President's signing statement is available on the White House web site.

⁶⁹The amendment inverted two letters in the case reference to *Roeder* that had been contained in P.L. 107-17, changing "1:00CV03110 (ESG)" to "1:00CV03110 (EGS)." See 107-117, Title II, § 208 (Jan. 10, 2002). The amendment had originally been included in the DOD appropriations bill as reported and adopted by the Senate but without explanation. See H.R. 3388 as reported by the Senate Appropriations Committee (S. Rept. 107-109 (Dec. 5, 2001) and Senate floor debate at 147 CONG. REC. S 12476-12529 (daily ed. Dec. 6, 2001), S 12586-12676 and S 12779-12812 (daily ed. Dec. 7, 2001).

⁷⁰S. Rept. 107-109, 107th Cong., 1st Sess. (Dec. 5, 2001).

Since the enactment of sub-section 626(c) and consistent with it, the executive branch has encouraged the courts to act, and will continue to encourage the courts to act, in a manner consistent with the obligations of the United States under the Algiers Accords that achieved the release of U.S. hostages in 1981.⁷¹

The judge in *Roeder* heard additional argument on the matter on January 14, 2002, and will reportedly hold a final hearing on February 20, 2002.⁷²

Conclusion

The 1996 amendments to the FSIA allowing victims of terrorism to sue the state(s) responsible for damages in U.S. courts were enacted with broad political support. But subsequent difficulties in obtaining payment of the substantial damages assessed in default judgments by the courts and subsequent enactments to facilitate or allow such payment have raised issues that are fraught with both emotion and complexity. Matters of effectiveness, fairness, diplomacy, and possible reciprocal action against U.S. assets abroad have all come to the fore; and most recently the question of U.S. compliance with a specific international obligation has become part of the debate. In the meantime, judgments against terrorist states continue to be handed down; and the Bush Administration has been directed to produce a comprehensive compensation plan. That plan likely will be the next focal point of the ongoing debate.

⁷¹The President's signing statement is available on the White House web site.

⁷²Neely Tucker, *Hostages' Suit Against Iran Gets a Boost*, WASHINGTON POST, January 15, 2002.

APPENDIX I

**Judgments Against Terrorist States Covered By,
and Payments Made Pursuant to, § 2002⁷³**

JUDGMENT	COMPENSATORY DAMAGES AWARDED	PUNITIVE DAMAGES AWARDED	AMOUNT PAID PURSUANT TO § 2002 (INCLUDING INTEREST)	PROCEDURE USED
<i>Alejandre v. Republic of Cuba</i> , 996 F.Supp. 1239 (S.D. Fla. 1997)	\$50 million	\$137.7 million	\$96,708,652.03	Liquidation of blocked Cuban assets
<i>Flatow v. Islamic Republic of Iran</i> , 999 F.Supp.2d 1 (D.D.C. 1998)	\$27 million	\$225 million	\$26,002,690.15 million	100% option (appropriated funds)
<i>Cicippio v. Islamic Republic of Iran</i> , 18 F.Supp. 2d 62 (D.D.C. 1998)	\$65 million		\$73,260,501.72	100% option (appropriated funds)

⁷³Information on the amounts paid in the designated cases under § 2002 has been provided by the Office of Foreign Assets Control and is current as of January 24, 2002. Claimants choosing the 100 percent option are entitled to receive 100 percent of the compensatory damages awarded plus post-judgment interest on condition that they relinquish any further right to compensatory damages and any right to satisfy their punitive damages award out of the blocked assets of the terrorist state (including diplomatic property), debts owed by the United States to the terrorist state as the result of judgments by the Iran-U.S. Claims Tribunal, and any property that is at issue in claims against the United States before that and other international tribunals (such as Iran's Foreign Military Sales account). Claimants choosing the 110 percent option are entitled to receive 110 percent of the compensatory damages awarded plus post-judgment interest on condition they relinquish any further right to obtain compensatory and punitive damages.

JUDGMENT	COMPENSATORY DAMAGES AWARDED	PUNITIVE DAMAGES AWARDED	AMOUNT PAID PURSUANT TO § 2002 (INCLUDING INTEREST)	PROCEDURE USED
<i>Anderson v. Islamic Republic of Iran</i> , 90 F.Supp.2d 107 (D.D.C. 2000)	\$41.2 million	\$300 million	\$47,315,791.80	110% option (appropriated funds)
<i>Eisenfeld v. Islamic Republic of Iran</i> , 2000 U.S.Dist. LEXIS 9545 (D.D.C. 2000)	\$24.7 million	\$300 million	\$27,365,288.83	100% option (appropriated funds)
<i>Higgins v. Islamic Republic of Iran</i> , No. 1:99cv00377 (D.D.C. 2000)	\$55.4 million	\$300 million	\$57,086,233.16	100% option (appropriated funds)
<i>Sutherland v. Islamic Republic of Iran</i> , 151 F.Supp.2d 27 (D.D.C. 2001)	\$53.4 million	\$300 million	\$56,084,467.27	One claimant chose the 110% option, the others the 100% option (appropriated funds)
<i>Polhill v. Islamic Republic of Iran</i> , 2001 U.S.Dist. LEXIS 15322 (D.D.C. 2001)	\$31.5 million	\$300 million	\$35,041,877.36	110% option (appropriated funds)

JUDGMENTS	COMPENSATORY DAMAGES AWARDED	PUNITIVE DAMAGES AWARDED	AMOUNT PAID PURSUANT TO § 2002 (INCLUDING INTEREST)	PROCEDURE USED
<i>Jenco v. Islamic Republic of Iran</i> , 154 F.Supp.2d 27 (D.D.C. 2001)	\$14.64 million	\$300 million	Not yet paid	100% option chosen (appropriated funds)
<i>Wagner v. Islamic Republic of Iran</i> , 172 F.Supp.2d 128 (D.D.C. 2001)	\$16.28 million	\$300 million	Not yet paid	110% option chosen (appropriated funds)
<i>Stenholm v. Islamic Republic of Iran</i> -- case not yet decided				

APPENDIX II**Amount of Assets of Terrorist States
Blocked by the United States⁷⁴**

<u>STATE</u>	<u>AMOUNT OF BLOCKED ASSETS</u>
Cuba	\$193.5 million (prior to § 2002 payment)
Iran	\$347.5 million
Iraq	\$1587 million
Libya	\$1072.2 million
North Korea	\$24 million
Sudan	\$33.3 million
Syria	\$249 millio

⁷⁴This information is from the *Calendar Year 2000 Annual Report to the Congress on Assets in the United States Belonging to Terrorist Countries or International Terrorist Organization* (January, 2001), which was prepared by the Office of Foreign Assets Control in the Department of the Treasury.